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In the Supreme Court of the United States

October Term, 1973
No. 73-2

FRANK J. KAEHNI and MARIE KAEHNI,
Petitioners,

vs.

DIFFRACTION COMPANY,
Respondent.

REPLY BRIEF OF PETITIONERS

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In reply to the arguments in Respondent's Brief, the Petitioners submit:

(1) That although there is an argument that bad faith should be inferred from the history of the matter and from Mr. Kaehni having subsequently been shown to be wrong on the technical phases of the matter, the Respondent has been unable to identify any *evidence* of bad faith by Mr. Kaehni. "Calling names", as by accusing one of "bad faith" is not acceptable evidence.

(2) That although the trial judge ultimately decided Mr. Kaehni to have been "wrong", he himself did not perceive such error in the Petitioners' case when:

(a) He appointed neutral expert witnesses for trial;

(b) Overruled a motion by Respondent for judgment at the end of Petitioners' case in chief; and

(c) Overruled a motion by Respondent for judgment at the end of the entire trial.

In short, Mr. Kaehni could not have been so palpably "wrong" when the trial judge did not think so until later.

(3) That a litigant attempting to protect his rights in his patent is not expected to have perfect 20-20 foresight and to have a perfect score either on the legal aspects or the scientific aspects of his case. Our system of jurisprudence and our patent laws contemplate some differences of opinion, even though an opinion is later adjudged to be wrong.

(4) The Respondent has offered no alternative acceptable to our system, for avoiding the *chilling effect* that the decision below presents to inventors who would otherwise attempt to enforce their patent against infringers. No answer is offered by Respondent to the discouragement given to poor men wanting to protect their property by the devastating results created by the decision below.

(5) No decision has been cited by Respondent as an authority justifying the imposition on the Kaehnis of the severe penalty by the trial court below.

(6) The District Court by its Order and Judgment entered June 6, 1972, of which a copy appears as Appendix F to this Reply Brief, *authorized and approved* the award to Diffraction of its attorneys' fees *and* of Diffraction's costs and expenses under Rule 37(c) of the Federal Rules of Civil Procedure. The Bill of Costs, shown in Appendix E to the Petition, was filed pursuant to, and under the authority of, this Order and Judgment. Piecemeal appeals

not being permitted, an appeal was timely taken from that Order and Judgment to the Fourth Circuit Court of Appeals, which on motion affirmed the District Court's Judgment (Appendix B).

(7) There remains for decision, and for the guidance of the courts below, the broad policy question, important to both our general system of jurisprudence and to our patent system, whether "*the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel*", as observed by this Court in:

Fleischmann Distilling Corp. v. Maier Brewing Co. (1967) 386 U.S. 714, 87 S.Ct. 1404, 153 USPQ 432, which decision was discussed on pages 14-15 of the Petition for a Writ of Certiorari.

(8) The results of the decisions below could put a strain on the admonition heard so often these days, and particularly the advice given to young people, that they should "work within the system" and should depend upon the courts to dispense justice rather than trying to enforce their rights outside of the judicial system. This may be a broad philosophical question but *this case* presents an opportunity of giving practical meaning and effect to that current admonition and advice.

It is believed that the grant of the requested Writ of Certiorari would be a salutary thing and should be here granted.

Respectfully submitted,

BRUCE B. KROST
and
EDWARD I. STILLMAN
Attorneys for Petitioners

APPENDIX F

Civil Action No. 20693

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK J. KAEHNI and MARIE KAEHNI,
Plaintiffs,

vs.

THE DIFFRACTION COMPANY, INC.,
Defendant.

ORDER AND JUDGMENT

This action came on for trial, before the Court, Honorable Edward S. Northrop, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered pursuant to Memorandum Opinion and Order dated April 28, 1972, it is this 6th day of June, 1972,

ORDERED, ADJUDGED AND DECREED

1. That U.S. Patent No. 2,463,280 is not infringed as to all the claims thereunder in this suit, namely claims 1, 2, 3 and 4,

2. That judgment is entered in favor of the Defendant The Diffraction Company against the Plaintiffs, Frank J. Kaehni and Marie Kaehni with costs,

3. That the Defendant's motion and request for award of reasonable attorneys' fees is granted, and

4. That the Defendant's alternative request for award of costs and expenses under Rule 37(c) of the Federal Rules of Civil Procedure is, in the alternative, granted.

(s) EDWARD S. NORTHROP
Chief United States District Judge